No. 84-571

IN THE

Supreme Court of the United States

October Term, 1984

HARRY N. WALTERS, Administrator of Veterans' Affairs, *et al.*

Appellants

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, *et al.*

Appellees

On Appeal from the United States District Court for the Northern District of California

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BRIEF OF AMERICAN VETERANS COMMITTEE, INC. (AVC) Amicus Curiae (in support of Appellees)

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INTEREST OF AMICUS CURIAE

The American Veterans Committee, Inc. (AVC) is a national veterans organization, founded in 1943. Its members served honorably in the Armed Forces of the United States in World War I, World War II, Korean War, and/or Vietnam War.

As a veterans organization recognized by the Veterans Administration (VA) pursuant to 38 U.S. Code 3402(a)(1), AVC has for many years aided veterans and their kin in

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*Pursuant to this Court's Rule 36, letters from counsel for all parties consenting to filing this Brief have been filed with the Clerk of this Court.

applying for benefits under federal programs administered by VA. AVC believes such aid helps to advance the purposes of these programs. However, AVC has also long believed:

(a) that 38 U.S. Code 3404(c) and 3405, which prohibit attorneys from receiving more than $10 for providing legal services to those seeking VA-administered benefits, result in denying to those applicants the opportunity to have effective legal assistance to obtain those benefits;

(b) that such denial, particularly in the context of VA's exclusive control over all applications for such statutory benefits and the unavailability of judicial review as to virtually all VA actions,[1] deprives claimants for veterans' benefits of their constitutional rights, and results in an administrative system for the adjudication of veterans benefits that is unfair to many applicants; and

(c) that this denial of the constitutional right to have legal counsel is not answered by VA's statement that claimants for veterans benefits do not need the services of a lawyer because claimants will be fully helped by VA staff and by representatives of veterans organizations. The facts are (1) that neither VA nor any governmental agency can, realistically, fully act for both the government's interest and a claimant's interest on disputed issues while also acting as judge of the merits of claims free from any judicial review, and (2) that although lay representatives of veterans' organizations do adequately help many claimants in relatively simple matters, they cannot, and do not, provide the type of legal assistance

[1]38 U.S. Code 211(a)

needed in many cases, particularly where factual or legal issues are complex.

We also believe that a person's right to have assistance of legal counsel in relation to his or her legal claim is so firmly a part of our Constitution that it should not be denied to a veteran or his or her survivors for statutorily-granted benefits. The $10-fee limit is so nugatory, so restrictive, so debarring, that it effectively destroys any realistic opportunity[2] for claimants of veterans benefits to obtain legal counsel in cases whose complexity is often beyond their capability to handle in a VA proceeding, even with such aid as they might get from VA staff and lay representatives of veterans organizations. It is particularly important to note that the VA

[2]We do not say that every statutory limit on attorneys' fees amounts to a denial of due process and the constitutional right to legal counsel. For example, on January 22, 1985, Cong. Don Edwards and 86 other Members of Congress introduced H.R. 585, and on January 31, 1985, Sen. Gary Hart and 25 other Senators introduced S. 367, which would modify, but not eliminate, the present limits on attorneys' fees relating to claims for veterans benefits. These bills, in slightly different form, would continue the $10 fee limit until VA renders an initial decision, but would authorize attorney fees in further VA proceedings, equal to the lesser of (a) any fee agreed upon by the claimant and the attorney, or (b) 25 percent of past due benefits obtained under a contingent fee contract, or (c) $500. But the bills would authorize the VA Administrator to allow an even greater fee in cases involving extraordinary circumstances, or pursuant to subsequent VA regulations based on changed economic conditions. In addition, the bills would authorize judicial review of most VA decisions, and in such judicial proceedings the court could award "reasonable fees" in cases resolved in the claimant's favor, up to 25 percent of past due benefits obtained under a contingent fee contract, or up to $750 in other cases. When the bills are debated, it may be argued that these limits ought to be raised. But it is obvious that those limits provide a far more reasonable opportunity for obtaining legal services prior to final determination of the claim for veterans' benefits than the present $10-fee limit which effectively destroys any such opportunity.

proceeding is the all-important stage for determining claims for veterans' benefits, since most VA rulings on claims are not, under present law, subject to any judicial review.

We believe that any purpose of the present attorney-fee restriction, even if justifiable when the restriction was first enacted in 1862 (over 122 years ago), does not now justify the deprivation of independent legal assistance which results from that fee restriction, and that such deprivation at this time denies to applicants for statutory veterans benefits their right to due process of law and their right to have legal counsel of their choice under the Fifth and First Amendments to the Constitution.

THE CHALLENGED STATUTORY PROVISIONS AND THEIR ORIGIN

The current statutory provisions challenged in this case are:

38 U.S.C. 3404(c)

"The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—

(1) shall be determined and paid as prescribed by the Administrator;

(2) shall not exceed $10 with respect to any one claim; and

(3) shall be deducted from monetary benefits claimed and allowed."

38 U.S.C. 3405

"Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him, shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both."

The first predecessor of these provisions limiting the fees of attorneys and agents who aided a claimant for benefits related to military service was the Act of July 14, 1862 (12 Stat. 566, 568). Sec. 6 allowed a maximum of $5 to attorneys and agents for "making out and causing to be duly executed a declaration by the applicant, with the necessary affidavits, and forwarding the same to the Pension Office, with the requisite correspondence," plus $1.50 in "cases wherein additional testimony is required by the Commissioner of Pensions, for each affidavit so required and executed and forwarded (except the affidavits of surgeons)." Sec. 7 of the 1862 Act, using virtually the same language now in 38 U.S. Code 3405, imposed criminal penalties upon attorneys and agents who sought more than these limited fees. Sec. 12 of the Act of July 4, 1864 (13 Stat. 387, 389) changed these limits to a maximum of $10; and sec. 13 of the 1864 Act broadened the criminal penalties language.

In the next 90 years, Congress enacted some two dozen statutes authorizing military-service related benefits for various classes of beneficiaries. Most of these statutes imposed flat limits (from zero to $25) on fees of attorneys and agents who helped prepare claim forms and correspondence for applicants seeking those benefits. Five statutes, relating to litigation authorized in relation to military-service insurance benefits, beginning in 1917, permitted attorneys fees of up to 10 percent of the amount recovered

in such litigation.[3] These laws were later consolidated and codified.[4] The current $10 fee limit, and penalties, in 38 U.S. Code 3404(c) and 3405, now apply to all types of legal work relating to all claims under VA-administered programs except insofar as 38 U.S. Code 784(g) allows a fee up to 10 percent of the amount recovered in litigated insurance cases.

STATEMENT OF THE CASE

This suit, challenging the constitutionality of the $10 fee limitation, was instituted by several individual veterans, a veteran's widow, and two veterans organizations, many of whose members have pending claims for, or were denied, service-connected death-and-disability benefits authorized under statutes administered by V.A.

The plaintiffs engaged in extensive discovery proceedings (including depositions, interrogatories, affidavits, exhibits, etc.) to establish the scope of, and the methods for handling, claims for veterans benefits, the need for independent legal assistance, etc.

U.S. District Judge Patel ruled that the $10 fee limit is now unconstitutional and enjoined its enforcement. *National*

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[3]

Act of	Citation	Maximum Fee
June 12, 1917	40 Stat. 102, 105	10 percent
Oct. 6, 1917	40 Stat. 398, 410	10 percent
May 20, 1918	40 Stat. 555	5 percent plus $3 for preparing forms
June 7, 1924	43 Stat. 607, 612	5 percent
March 4, 1925	43 Stat. 1302, 1311	10 percent

[4] Act of June 29, 1936, 49 Stat. 2031, 2032; Act of June 17, 1957, 71 Stat. 83, 140-141; Act of Sept. 2, 1958, 72 Stat. 1105, 1239.

Association of Radiation Survivors v. *Walters,* 589 F. Supp. 1302 (N.D. Calif. 1984). The Government filed direct appeal here, obtained a stay of the injunction, and this Court on December 10, 1984 noted probable jurisdiction.

SUMMARY OF ARGUMENT

The $10 attorney fee limit, first adopted during the Civil War, was intended by Congress as compensation for relatively simple work and to protect those "who have borne the battle and their widows and orphans" against exorbitant fees by unscrupulous attorneys who were then subject to little, if any, regulation. When the fee limit was adopted, and for most of the Nineteenth Century, it was not grossly unfair. But the vast changes in our society since then dramatically altered the impact of that fee limit and made it totally unjustified now. The maximum $10 fee is no longer compensatory for virtually all kinds of legal assistance on a claim for veterans benefits, and that limit now constitutes a complete bar to any legal work that is not purely *pro bono.* Moreover, attorneys are now subject to standards of professional conduct which are far more effective than the $10 fee limit to prevent overreaching of clients whom they serve. Furthermore, the law, regulations, and procedures relating to veterans benefits have in many cases become intricate. The assistance which claimants for such benefits can get from VA staff and lay representatives of veterans organizations is inadequate in cases involving complex legal or factual issues, resulting in denial of statutory benefits which could have been obtained with adequate legal counsel.

This Court has often ruled that persons claiming statutory benefits have constitutional rights, based on the First and Fifth (and in state cases, on the Fourteenth) Amendments, to choose and use legal counsel to assist them on their statutory claims. Since the $10 fee limit destroys those rights, that limitation is unconstitutional.

This Court's summary affirmance almost 10 years ago in the *Gendron* case does not control this case. The case now before this Court presents extensive evidence about the complexity and adversarial nature of VA claim cases, and the inadequacy, particularly in complex cases, of the assistance available from VA staff and the lay representatives of veterans organizations. No such evidence was presented in the *Gendron* case, nor did the *Gendron* applicant show how the $10 fee limit adversely affected him, or even allege that any assistance available from lay representatives of veterans organizations would have been inadequate in his case. Nor did the *Gendron* case, unlike the present case, involve either a challenge to the $10 fee limit as being in violation of the First Amendment right to counsel, or a District Court finding and ruling to that effect.

The *Reese* case (see Part V, *infra*) dramatically illustrates how a veteran's widow, whose claim for statutory benefits was denied five times by VA, while she was being assisted by lay representatives of veterans organizations, finally had her claim approved when she obtained the *pro bono* services of a competent attorney who felt that VA's denials were unjust.

ARGUMENT

1. THE PRESENT $10 ATTORNEY FEE LIMIT, EVEN IF IT HAD A JUSTIFIABLE PURPOSE WHEN FIRST ADOPTED DURING THE CIVIL WAR, IS UNJUSTIFIABLE NOW.

In adopting the attorney fee restriction, Congress was motivated principally by apprehension that unscrupulous attorneys would charge exorbitant fees for helping to prepare applications and affidavits in relatively simple pension claim cases. *Smith v. United States,* 83 F.2d 631, 640 (8th Cir. 1936). It set the fee limit at a level that was

relatively fair for such work in most of the Nineteenth Century.

For example, in 1880, average wages were $2.26 per day for skilled workers, and $1.32 per day for laborers.[5] In 1909, production workers in manufacturing had average earnings of 19 cents per hour,[6] compared to $9.17 per hour in 1984.[7] Military basic pay for all personnel averaged $231 annually in 1865,[8] compared to $12,800 annually in 1983.[9] The suggested attorneys' fee schedule adopted in 1873 by the District of Columbia Bar Association dramatically illustrates the difference in attorney fee structure between then and now:[10]

Arguing a case in the Supreme Court of the District of Columbia	$50
Representing a client in a federal circuit court trial	$25
Representing a client in a police court trial	$10
Preparing a written contract or deed	$10
Preparing a will	$25
Examination of title abstract	$25
Collections	Ten percent of first $5,000, and five percent of the excess.

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[5]U.S. Dept. of Commerce, "Historical Statistics of the United States", Part 1, p. 165 (1975).

[6]*Ibid.*, p. 170.

[7]Economic Report of the President, H. Doc. 99-19, transmitted to Congress February, 1985. p. 276.

[8]U.S. Dept. of Commerce, "Historical Statistics of the United States", Part 1, p. 176 (1975).

[9]Statistical Abstract of the United States, 1984, p. 357.

[10]Harry J. Lambeth, "Practicing Law in 1878", 64 Amer. Bar Assoc. Journal, 1014, 1021-1022 (July, 1978).

Massive economic changes in the past century have eroded the value of $10 to a mere fraction of its Nineteenth Century worth. Today, no applicant for VA-administered benefits can obtain legal assistance under the $10 fee limit, except from a lawyer willing to donate his or her services. New veterans benefit laws with complex requirements and conditions have been enacted. VA procedures and rules, like those of other governmental agencies, have become intricate. In addition, many VA claims now require proof of disabilities resulting from complex radiological, chemical and psychological causes.

Thus, the $10 fee limit, which Congress set as a fair compensation for a simple type of service, has drastically changed over the past 100 years. It is now an almost absolute prohibition against the exercise of the constitutional right of veterans and their dependents and survivors to obtain legal counsel for the assistance needed, in many of the now complex VA administrative proceedings, to get the statutory benefits Congress intended them to have.

In addition, the major reason Congress enacted the fee limitation no longer exists. Congress intended the limitation to protect veterans statutory benefits from erosion by exorbitant fees of unscrupulous attorneys and agents who were largely unregulated in the Nineteenth Century. That situation has markedly changed. Legal standards of professional responsibility and conduct were developed and adopted in the Twentieth Century which now regulate lawyers' actions and ethics in relation to their clients. These legal standards provide methods of protecting against overreaching of veterans by attorneys that are more substantial, more flexible, and far less drastic than the statutory $10 fee limitation method which virtually destroys the constitutional rights to due process of law and to select and use legal counsel to assist on one's legal claims.

These changes alone make it clear that the present fee limitation no longer serves, if it ever did serve, the government's asserted interest in establishing the fee limit. But there have also been great changes in other aspects of the veterans benefits programs, which emphasize that there is no substantial basis and therefore no justification for continuing to allow that fee limit to negate fundamental constitutional rights.

Circumstances pertaining to life and health, as well as the law and agency regulations and procedures relating to veterans and their benefits, have become increasingly complex in recent decades. Many, perhaps most, potential claimants for statutory veterans benefits need assistance to present adequately the factual and legal basis of their claims. To deny them the opportunity to have such assistance is equivalent to denying them the benefits which Congress contemplated they should receive.

The extensive discovery proceedings in this case contain substantial evidence to support the following:

—that VA proceedings are often adversarial between applicants and VA;

—that the assistance provided to applicants by VA staff, and by the representatives (virtually none of whom are attorneys) of the veterans organizations, is frequently minimal or solely clerical;

—that such assistance is often not equivalent to the assistance which could be provided by attorneys from outside VA;

—that VA laws, regulations and procedures governing veterans claims are often complex;

—that many claims for veterans benefits involve technical and scientific matters, medical causation, multiple etiology, and complex issues of law and fact;

—that many of the rules or guidelines governing VA procedures are unpublished and not available to applicants;

—that VA staff frequently press claimants to waive their procedural rights;

—that relatively few applicants have the resources or knowiedge to obtain and to present documentary and oral evidence adequately at hearings, and to utilize their administrative and appeal rights properly;

—that many claims are abandoned either unknowingly or because the potential claimant simply is unable to obtain legal counsel.

The statutory prohibition against judicial review of VA decisions, which makes the administrative stage the all-important stage for determining whether the claimants will receive the statutory benefits they seek, also makes it "especially crucial that the VA's...procedures guarantee the degree of accuracy and fairness we expect of governmental processes." *Devine* v. *Cleland,* 616 F.2d 1080, 1088 (9th Cir. 1980). But the $10 fee restriction effectively precludes the claimants from obtaining needed legal assistance except in rare cases, and thus results in denying such assistance to the claimants. In the circumstances which produce the need for such assistance, the $10 fee restriction thus results in denying such claimants their constitutional rights to counsel.

Declaring the $10 fee limit to be unconstitutional will not require claimants for veterans benefits to hire an attorney, because they could choose not to do so and to proceed as they do now (either *pro se* or relying on VA staff or lay representatives of veterans organizations). Declaring the $10 fee limit unconstitutional would simply enable the claimants, if they desire the assistance of legal counsel, to exercise their constitutional rights to choose and use legal counsel to assist them in seeking the statutory benefits Congress intended them to have.

II. THE CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS INCLUDES THE RIGHT NOT TO BE DENIED THE ASSISTANCE OF COUNSEL IN PROCEEDINGS BEFORE GOVERNMENT AGENCIES DECIDING AN INDIVIDUAL'S CLAIM FOR STATUTORY BENEFITS.

This Court ruled in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) that persons entitled to statutory welfare benefits are entitled to procedural due process of law in adjudication of their rights to benefits, including the rights to a hearing and to be allowed to obtain an attorney's assistance.[11] This Court pithily delineated

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[11]Numerous decisions have held that applicants for statutory benefits have a "property" interest therein sufficient to invoke protection of the Due Process Clause of the Constitution. *Ressler* v. *Pierce,* 692 F. 2d 1212, 1214-1216 (9th Cir. 1982) (applicants for subsidized housing); *Kelly* v. *Railroad Retirement Board,* 625 F. 2d 486, 489-490 (3rd Cir. 1980) (disability compensation under Railroad Retirement Act); *Devine* v. *Cleland,* 616 F. 2nd 1080, 1086 (9th Cir. 1980) (student-veteran receiving VA educational benefits); *Griffeth* v. *Detrich,* 603 F. 2d 118, 120-122 (3rd Cir. 1978), *cert. den. sub nom. Peer v. Griffeth,* 445 U.S. 970 (1980) (State Welfare benefits); *Wright v. Califano,* 578 F.2d 345, 354 (7th Cir. 1978) (Social Security benefits); *Elliott v. Weinberger,* 564 F.2d 1219, 1230 (9th Cir. 1977), modified on other grounds sub nom, Califano v. Yamasaki, 442 U.S. 682 (1979) (Social Security benefits); *Tatum v. Matthews,* 541 F.2d 161, 164 (6th Cir. 1979) (benefits for permanent and total disability); *Caulder v. Durham Housing Authority,* 433 F.2d 998, 1004 (4th Cir. 1970), *cert. den.,* 401 U.S. 1003 (1971) (tenant in publicly subsidized low-rent housing); *Davis v. United States,* 415 F. Supp. 1066, 1090-1092, 1095-1096 (D. Kans. 1976) (disability compensation for injuries while employed in prision hospital); *Plato v. Roudebush,* 397 F. Supp. 1295, 1303, (D. Md. 1975) (veterans pension benefits); *Shaw v. Weinberger,* 395 F. Supp. 268, 270-271 (W.D., N. Car 1975) (Supplemental Social Security benefits); *Barnett v. Lindsay,* 319 F. Supp. 610, 612 (D. Utah 1970) (welfare benefits).

the constitutional right to due process in that case, as follows (at pp. 270-271):

> " 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.' *Powell* v. *Alabama,* 287 U.S. 45, 68-69 (1932). We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing."

The fundamental nature of this basic principle is evident from Justice Sutherland's words more than 50 years ago in *Powell* v. *Alabama,* 287 U.S. 45, 69 (1932), as follows:

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

III. THE FIRST AMENDMENT RIGHTS OF FREEDOM OF SPEECH AND ASSOCIATION, AND TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES, ARE IMPAIRED WHEN PERSONS FOR WHOM STATUTORY BENEFITS ARE INTENDED ARE PREVENTED BY LAW OR GOVERNMENTAL ACTION FROM CHOOSING AND USING QUALIFIED LEGAL COUNSEL TO ASSIST THEM IN SEEKING THOSE BENEFITS.

This Court has repeatedly noted that lawyers are "necessities, not luxuries" because "the services of a lawyer will for virtually every layman be necessary to" adequately assist or defend their rights in our system of law and governmental regulation.[12] This Court has therefore many times held that impending access to legal counsel violates the First Amendment to our Constitution. Among these cases are:

NAACP v. *Button,* 371 U.S. 415 (1963), invalidating state ban on solicitation of attorneys to assist persons in civil rights matters.

Brotherhood of Railroad Trainmen v. *Virginia State Bar,* 377 U.S. 1 (1944), holding that a state court injunction prohibiting a union from recommending specific lawyers to its members to handle their injury claims infringes the First Amendment.

United Mineworkers v. *Illinois Bar Association,* 389 U.S. 217 (1967), holding that a state court injunction preventing a union from employing lawyers to represent its members seeking statutory benefits violates the constitutional protection of the freedom of speech, assembly and petition provisions of the First Amendment.

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[12] *Evitts v. Lucey,* ____ U.S. ____, 53 U.S. Law Week 4101, 4103 (January 21, 1985) (holding that the right to counsel includes the right to have effective assistance of counsel), and citing *Andrews* v. *California,* 386 U.S. 738 (1976) and *Entsminger* v. *Iowa,* 386 U.S. 748 (1967).

United Transportation Union v. *State Bar of Michigan,* 401 U.S. 576 (1971), holding that a state court injunction barring a union from providing legal services to its members and accepting compensation for solicitation of legal employment violates the First and Fourteenth Amendments protecting the right to obtain lawyers for meaningful access to the courts.

Bounds v. *Smith,* 430 U.S. 817 (1977), upholding a prisoner's right to have access to lawyers.

Bates v. *State Bar of Arizona,* 433 U.S. 350 (1977), invalidating a ban on advertising by lawyers of their fees.

In sum, it is ironic and unfair that veterans (and their spouses and dependents), who staked their lives and health in fighting to preserve the Bill of Rights and its guarantee of legal counsel which it protects for virtually all others, are denied the right to choose and use legal counsel to help them obtain the statutory benefits Congress intended them to have.

IV. THE *GENDRON* AFFIRMANCE DOES NOT FORECLOSE AFFIRMANCE OF THE DISTRICT COURT'S DECISION IN THIS CASE.

The applicant for VA benefits in the *Gendron* case challenged the constitutionality of the $10 attorney fee limit, but the District Court rejected his challenge and this Court affirmed *per curiam.* [13] But that affirmance does not prevent affirmance of this case, which is very different. The applicant in *Gendron* produced no evidence that the $10 fee limit adversely affected him, and did not even allege that the aid he could have received from representatives of veterans organizations was inadequate. Moreover, the appellees in the case now before this Court presented extensive evidence concerning the complexity and adversarial nature of the issues and procedures in many VA claim cases requiring

[13] *Gendron v. Saxbe,* 389 F. Supp. 1303 (C.D. Calif. 1975), aff'd per curiam *sub nom. Gendron v. Levi,* 423 U.S. 802 (1975).

assistance of an attorney, the inadequacy of assistance provided to claimants by VA staff and lay representatives of veterans organizations in complex cases, and the adverse impact of the $10 fee limit on the claimants for VA benefits in this case. Since a Due Process challenge must be judged in light of the circumstances to which it relates, it is plain that the *Gendron* case did not adequately present such a challenge. In this case, however, the District Court fully considered and weighed the extensive evidence pertinent to such a challenge and upheld the challenge on the basis of such evidence. Moreover, unlike this case, the *Gendron* case did not involve or rule upon a challenge to the constitutionality of the $10 attorney fee limit as a violation of the First Amendment right to counsel.

V. THE *REESE* CASE IN THE VA ILLUSTRATES HOW A COMPETENT ATTORNEY CAN PROVIDE MUCH BETTER ASSISTANCE, IN A COMPLEX VA CASE, THAN IS FURNISHED BY LAY REPRESENTATIVES OF VETERANS ORGANIZATIONS, AND CAN MAKE THE DIFFERENCE BETWEEN A CLAIMANT'S OBTAINING, OR BEING DENIED, THE STATUTORY BENEFITS INTENDED BY CONGRESS.

Lt. Col. Joseph W. Reese, who was decorated for bravery in the Vietnam War, retired after 20 years of active military service. His wartime experiences in Vietnam had caused him to become an alcoholic. One year and 62 days after his release from active duty, he was hospitalized and diagnosed as having alcoholic cirrhosis of the liver. He died in February 1979, of gastrointestinal hemorrage due to his alcoholic liver cirrhosis. In March, 1979, his widow, Mrs. Jackie D. Reese, filed application (XC 28 733 518) for survivor benefits (38 U.S. Code, Ch. 13), asserting that the condition causing his death occurred during his military

service, and certainly during the presumptive one-year period after his release from active. duty. 38 U.S. Code 312(a)(1).

VA denied Mrs. Reese's claim five times[14] between 1980 and 1984, asserting that the diagnosis of alcoholic liver cirrhosis was made 62 days after the presumptive one-year period and that there was inadequate proof that the cirrhosis existed either during Col. Reese's military service or the presumptive period. All of these decisions were made without oral hearings except one in December 1982 which lasted 26 minutes and consisted of testimony by Mrs. Reese and her mother, and argument by a lay representative of a veterans' organization.

Mrs. Reese could afford hiring an attorney but was repeatedly told by VA staff and the representatives of the VA-recognized veterans organizations who assisted her that she did not need an attorney and would be better served by the lay representatives. She also could afford the cost of obtaining medical experts to testify at a hearing to prove that the cirrhosis condition which caused her husband's death existed during his military service or within the following year. Neither VA staff nor the representatives of the two veterans organizations[15] to which she entrusted her case suggested obtaining such expert witnesses to testify at the hearing..

When her sixth appeal was filed and a hearing set for July 1984, Mrs. Reese asked an attorney (himself a veteran and a longtime private practitioner) to review her case. Because he felt that a grave injustice had been inflicted on her, he

[14]July 2, 1980; Feb. 6, 1981; Jan. 8, 1982; Mar. 30, 1982; and Jan. 13. 1983. *Case of Joseph W. Reese* (XC 28 733 518).

[15]Initially, four different lay representatives of one veterans organization aided her, but after they lost their file of the case, she was aided by two different representatives of another veterans organization.

agreed to handle her case *pro bono*. He obtained and presented four medical experts, as well as other witnesses and other evidence concerning Col. Reese's health, habits, and cause of death, which had not previously been presented, and argued her case before the VA Board of Appeals. On November 26, 1984, the Board ruled that Col. Reese incurred his liver cirrhosis while in military service and that such service-connected disease or disability did cause or contribute to his death, and thus that his surviving spouse was entitled to the pension benefit for which she had applied almost six years earlier.

It is clear (1) that Mrs. Reese won on her sixth effort only because she was aided by a competent attorney with experience in presenting evidence in difficult and complex cases; (2) that if her sixth effort had been presented by lay representatives of a veterans organization as had been done previously, her claim would have been again denied; and (3) that if a competent attorney had represented her at the earlier presentations, she would have received her pension entitlement five years earlier.

In sum, competent legal counsel, particularly in complex cases, can make the difference between obtaining, or being denied, the statutory service-connected benefits that Congress intended. The $10 attorney fee limitation virtually bars the opportunity to obtain competent legal counsel, except in the rare instances where the claimant can obtain a *pro bono* attorney. Thus, that fee restriction gravely, and unnecessarily, hampers the claimant's ability to obtain the Congressionally-intended statutory benefits, and violates the claimant's constitutional rights to counsel and to due process of law.

CONCLUSION

The District Court's judgment, holding the $10-fee limit in 38 U.S. Code 3404(c) and 3405 unconstitutional and enjoining its enforcement, should be affirmed.

Respectfully presented

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